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**Interpreting International Human Rights Standards – Treaty Body  
General Comments in Domestic Courts**

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**Working Paper No. 4**



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# **Interpreting International Human Rights Standards – Treaty Body General Comments in Domestic Courts**

*Kasey McCall-Smith\**

**Abstract:** This paper explores the introduction of treaty body jurisprudence into domestic legal systems. Specifically it will consider the use of general comments by human rights treaty bodies. The contribution will begin with a brief introduction of the treaty bodies, as it is the nature of these bodies that warrants consideration of their jurisprudence as a legitimate interpretive tool. It will then present an overview of references to treaty body general comments in the case law across a selection of jurisdictions, including the UK and South Africa, as well as the EU as a supranational jurisdiction. Finally, it will analyse the impact that these domestic engagements with treaty body jurisprudence has on the interpretation of international human rights standards. It will consider whether the outcome of a court case that has relied upon general comments contributes to or detracts from the strength of the treaty body outputs. It is posited that in instances where rights are progressively recognised for protection, general comments serve as a chisel to aid in refining rights. In instances where the judiciary disregards or distorts treaty body guidance, it is suggested that the general comments act more as a hammer that weakens a particular right. Thus it is extremely important that treaty bodies take special care when drafting their opinions, comments and reports therefore some attention will be given to the issue of treaty body drafting.

## **1. Introduction**

Human rights treaties are standard-setting, yet these standards are open-textured and evolutionary. Therefore interpretive tools must be engaged in order to flesh out the true extent of states' obligations, particularly as these obligations evolve to reflect rights in the modern world. The human rights treaty bodies embedded in each of the UN human rights treaties are comprised of experts in the field specific to each treaty and represent a unique feature of the core treaties in that they are the primary interpreters of the treaties at the international level. Human rights treaty bodies have contributed a great deal to the development of measurable international human rights obligations. Through the functions confirmed by their respective treaties, treaty bodies have a range of options by way of which they can inform States Parties about the evolving nature of human rights protection. From issuing general comments, to appraising states' periodic reports, or reaching final views on individual communications – what will be referred to collectively throughout this chapter as 'jurisprudence' – there is no lack of soft law to be found. Though many states often ignore

treaty body jurisprudence, there is unmistakeable evidence that it is creeping into the domestic realm by virtue of increasing reference in domestic court opinions and policy debates. The persisting question is whether the use of treaty body jurisprudence at the domestic level refines or distorts the development of universal human rights standards.

Human rights treaty bodies are invested by their respective treaties with the competence to assess the implementation of the obligations. As will be examined below, the various methods by which treaty bodies may engage in this assessment is outlined in each treaty and the competences of each supervisory mechanism varies, albeit only slightly. The jurisprudence produced through the exercise of these competencies is a form of soft law that can respond to the legal and social environment more flexibly and guide interpretation and state practice in the international sphere. In other words, the soft law produced by the treaty bodies is norm-filling.<sup>1</sup> However, it is when these soft instruments are introduced into domestic legal systems that they are truly tested, especially when the instruments are used in a peculiar manner.<sup>2</sup> The impact of these references sustains the concept of soft law that treaty body instruments contain rules which are in the process of incubation. The judicial practices surveyed herein suggest that these incubating rules – or more accurately, interpretations of the minimalist binding rules found in the treaties themselves – are gaining traction. It also supports the oft-repeated maxims that human rights treaties do not exist in a vacuum<sup>3</sup> and are ‘living instruments’<sup>4</sup> which makes evolutionary interpretation necessary.

This paper explores the introduction of treaty body jurisprudence into domestic legal systems. Specifically it will consider the use of general comments.<sup>5</sup> The contribution will begin with a brief introduction of the treaty bodies, as it is the nature of these bodies that

<sup>1</sup> T. Gammeltoft-Hansen, S. Lagoutte and John C., ‘Introduction: Tracing the Roles of Soft Law in Human Rights’, not yet published - copy on file.

<sup>2</sup> The same observation can be said of domestic court application of treaty interpretation rules generally. See, e.g. H.P. Aust, A. Rodiles and P. Staubach, ‘Unity or Uniformity? Domestic Courts and Treaty Interpretation’ (2014) 27 *Leiden Journal of International Law* 75-112, 84.

<sup>3</sup> For example, F. Hampson, Working paper submitted pursuant to Sub-Commission decision 1998/113, UN Doc. E/CN.4/Sub.2/1999/28 (1999) (1999 Working paper), para. 13.

<sup>4</sup> A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, 2007) 155.

<sup>5</sup> Throughout this chapter the term ‘general comments’ will be used collectively in reference to both general comments and general recommendations as in practice both terms refer to the same form of treaty body jurisprudential product. See for example, International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 Dec. 1966, Art. 40(4): ‘The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such *general comments* as it may consider appropriate, to States Parties’ (emphasis added). The Convention on the Elimination of All forms of Discrimination against Women (CEDAW) 1249 UNTS 13, 18 Dec. 1979, Art. 21(1): ‘The Committee shall...report annually to the General Assembly of the United Nations on its activities and may make suggestions and *general recommendations* based on the examination of reports and information received from the States Parties’ (emphasis added). Similar statements can be found in each of the core UN human rights treaties discussed in this paper.

warrants consideration of their jurisprudence as a legitimate interpretive tool. It will then present an overview of references to treaty body general comments in the case law across a selection of jurisdictions, including the UK and South Africa, as well as the EU as a supranational jurisdiction. Finally, it will analyse the impact that these domestic engagements with treaty body jurisprudence has on the interpretation of international human rights standards. It will consider whether the outcome of a court case that has relied upon general comments contributes to or detracts from the strength of the treaty body outputs. It is posited that in instances where rights are progressively recognised for protection, general comments serve as a chisel to aid in refining rights. In instances where the judiciary disregards or distorts treaty body guidance, it is suggested that the general comments act more as a hammer that weakens a particular right. Thus it is extremely important that treaty bodies take special care when drafting their opinions, comments and reports therefore some attention will be given to the issue of treaty body drafting.

As an interpretive tool, treaty body general comments enrich the understanding of human rights obligations and it is clear that state organs are increasingly willing to entertain these views in order to better define human rights at the domestic level. As an increasingly authoritative form of soft law, general comments are shaping the way in which domestic courts interpret international human rights standards. What is not clear is whether these standards are bolstered or undermined by the unwieldy nature of domestic interpretations.

## **2. Human Rights Treaty Bodies**

Human rights treaty bodies are the embedded international institutions of the UN human rights treaties and the primary enforcement mechanisms of the texts' obligations. All of the treaty bodies review periodic reports and are authorised to issue general comments<sup>6</sup> as they may consider appropriate. Essential to the perceived legal value of the opinion documents of the treaty bodies is the independent, expert, non-political status of the bodies.

Each of the treaty bodies' membership election processes are crafted to guarantee that an unbiased authority exercises oversight over the universal human rights treaties. The treaty body election guidelines seek to achieve equitable geographical distribution in addition to representation of different types of civilisations and legal systems among the States Parties, which helps ensure that no one region or culture dominates. Essential to the execution of their

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<sup>6</sup> *Ibid.*

duties is the requirement that members act in their personal capacities, not as representatives of their governments despite being nominated by them.

It has been suggested that experts working together in the international context ‘can facilitate the resolution of global policy issues by narrowing the range within which political bargains could be struck.’<sup>7</sup> For example, typical members of the CEDAW Committee have been active in the areas of gender equality and women’s issues and this is reflected by their curriculum vitae. Picciotto observed that ‘delegating specific issues to specialists who would deal with them in a depoliticized fashion...is a means of implementing policies that have been formulated through political processes...[and] understood as a response to the problems of governing ever more complex societies.’<sup>8</sup> The treaty bodies exist to ensure specific rights are implemented into a variety of social, cultural and political jurisdictions. The combination of a highly varied membership and specialists in the field, both mandated by committee election guidelines, provides an essential element of legitimacy to the work of the treaty bodies. Without the treaty bodies supervising implementation, human rights treaties would be in danger of becoming merely aspirational.

### 3. Treaty Body Jurisprudence

States Parties have a duty of good faith to cooperate with the treaty body as recognised by general principles of treaty law.<sup>9</sup> It is essential that treaty bodies interpret the obligations in light of the domestic situation on the ground, including introduction of new law or reconciliation with existing law. The interaction between a treaty body and a State Party is very much an exclusive, interactive process and is best understood as an on-going dialogue. Thus, treaty bodies function primarily on a bilateral plane.<sup>10</sup> The exception to this rule is the practice of issuing general comments or recommendations, which are specifically intended to provide useful information to all States Parties regarding how convention obligations should be implemented.

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<sup>7</sup> S. Picciotto, ‘Constitutionalizing Multilevel Governance?’ (2008) 6 *International Journal of Constitutional Review* 457-479, 459.

<sup>8</sup> *Ibid.*

<sup>9</sup> Vienna Convention on the Law of Treaties (Vienna Convention), 1155 UNTS 331, 23 May 1969, Art. 26. This is also typically noted within each of the treaty texts.

<sup>10</sup> N. Rodley, ‘United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights: Complementary or Competition?’ (2003) 25 *Human Rights Quarterly* 882-908, 887.

General comments are often viewed as the ‘attendant product’ to guide states on the scope of treaty obligations.<sup>11</sup> In light of the concerns of many states about interference with state sovereignty, the treaty bodies’ obligations to make general comments is possibly the strongest language available to indicate that they are singularly responsible for guiding states’ compliance with a treaty despite the fact that this practice has often been harpooned by states as an over-extension of their powers.<sup>12</sup> General comments address the entirety of States Parties, rather than individual states as with the communications or periodic reporting procedures, and they range from mundane matters of internal treaty body functioning to elucidating the appropriate means of protecting particular rights.<sup>13</sup>

### 3.1 General comments - evolving practice

The practice of issuing general comments began in 1981 with the Human Rights Committee pursuant to ICCPR Article 40.<sup>14</sup> Eight of the nine core UN human rights treaty bodies have issued a combined 145 general comments on various aspects of their respective treaties.<sup>15</sup> These include the CERD Committee<sup>16</sup> (35 comments), the Human Rights Committee (HRC)<sup>17</sup> (35 comments), the ESCR Committee<sup>18</sup> (21 comments), the CEDAW Committee<sup>19</sup> (30 comments), the CAT Committee<sup>20</sup> (3 comments), the CRC Committee<sup>21</sup> (17 comments),

<sup>11</sup> *Ibid.*, 906.

<sup>12</sup> See, for example, *Observations by the United States of America and the United Kingdom on General Comment No. 24(52)*, UN Doc. A/50/40 (1995); reprinted in (1995) 16 *Human Rights Law Journal* 423.

<sup>13</sup> See Rodley (n10) 888; H.J. Steiner, ‘Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?’, in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 22.

<sup>14</sup> For a more complete overview of the history of general comments see H. Keller and L. Grover, ‘General Comments of the Human Rights Committee and their Legitimacy’, in H. Keller and G. Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 121-127; P. Alston, ‘The Historical Origins of the Concept of ‘General Comments’ in Human Rights Law’ in L. Boisson de Chazournes and V. Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-saab* (2001) 763, reprinted in H. J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context: Law, Politics, Morals* (3<sup>rd</sup> edn: Oxford University Press, 2008) 873 *et seq.*

<sup>15</sup> As of 20 November 2014.

<sup>16</sup> The treaty body established by Art. 8 of the Convention on the Elimination of all forms of Racial Discrimination (CERD), 669 UNTS 195, 21 Dec. 1965.

<sup>17</sup> The treaty body established by Art. 28, ICCPR.

<sup>18</sup> The treaty body overseeing the International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3, 26 Dec. 1966, was established by ECOSOC Resolution 1985/17, 28 May 1985. Prior to the resolution, reports were submitted directly to the UN Economic and Social Council pursuant to Article 16 of the Covenant.

<sup>19</sup> The treaty body established by Art. 18 of CEDAW.

<sup>20</sup> The treaty body established by Art. 17 of the Convention on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 465 UNTS 85, 10 Dec. 1984.

<sup>21</sup> The treaty body established by Art. 43 of the Convention on the Rights of the Child (CRC), 1577 UNTS 3, 20 Nov. 1989.

the Committee on Migrant Workers<sup>22</sup> (2 comments), and the newest treaty body to commence operation, the Committee on the Rights of Persons with Disabilities (2 comments). The most recent general comment was adopted in October 2014 by the HRC on the right to liberty and security of person.<sup>23</sup>

The debate amongst observers of the UN human rights regime assigns disparate levels of importance to these comments as a form of soft law. Some view them as authoritative interpretations of the treaties while others view them as unsystematic and unfounded statements deserving no recognition in the law.<sup>24</sup> Though there is far from consensus on the determination of exactly what legal weight general comments carry, it is evident that they have influenced the protection of human rights and the enrichment of the human rights dialogue.

### 3.2 Guiding principles on general comments

The guiding principles on formulating comments, an amalgamation of the procedure and practice that has developed since 1981, indicate that they should be directed to States Parties, promote co-operation between States Parties, summarise the experience the committee has gained reviewing the States Parties' periodic reports and focus the attention of the States Parties on matters that would improve implementation of the treaty obligations.<sup>25</sup> They are intended to provide 'significant normative guidance' on aspects of implementation of the treaty.<sup>26</sup> Furthermore, the subjects should be limited to those involving implementation of obligations related to periodic reports, guarantee of the treaty rights, article specific questions or suggestions relating to cooperation between States Parties.<sup>27</sup> General comments are most often expository in style and the language typically reflects the expertise of the treaty body in dealing with the treaty obligations under its supervision.<sup>28</sup> In maintaining a formula, albeit a vague one, it is intended that comments adhering to the guidelines will be more widely accepted by states.

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<sup>22</sup> The treaty body established by Art. 72 of the Convention for the Protection of the Rights of Migrant Workers and Their Families (CRMW), 2220 UNTS 3, 18 Dec. 1990.

<sup>23</sup> HRC, *General Recommendation No 35: Article 9: Liberty and Security of person*, UN Doc. CCPR/C/GC/35 (2014), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en) (last accessed 1 December 2014).

<sup>24</sup> See Keller and Grover (n14) 118-19.

<sup>25</sup> See Alston (n14) 876.

<sup>26</sup> Keller and Grover (n14) 124.

<sup>27</sup> Alston (n14) 876.

<sup>28</sup> See, for example, Rodley (n10) 888-89, discussing the HRC's general comment on ICCPR Art. 7.



The lack of a clear definition of ‘general comment/recommendation’ in the treaties coupled with the vague guidelines outlines has resulted in diverse subject matters ranging from implementation of CERD Article 6<sup>29</sup> to the practice of reservations to the ICCPR<sup>30</sup> and CEDAW<sup>31</sup>. What is important to reiterate is that the treaty bodies are carrying out their duties under the treaty texts. The issue of transmitting comments, as with many aspects in the human rights regime, was intentionally left undefined so that practices could develop as the human rights movement spread. However, it is now clear that the practice is firmly established and accepted by the majority of States Parties.<sup>32</sup>

### 3.3 General Comments – points of contention

The issuing of general comments has traditionally been the point at which states articulate opposition to treaty bodies as they often view the practice as going beyond the treaty into the realm of developing new law.<sup>33</sup> States that are reluctant to have their implementation programmes checked by a non-domestic entity are a throw-back to the world when it was smaller and human rights were not such an international concern. General comments air the problems that surface during the review of periodic reports and though they are not state-specific, the fact that reports and comments are publicly available lends to the easy association of themes and, therefore, may be embarrassing to states with less than commendable rights records. This, in turn, causes offended States Parties to argue the lack of legal basis for the comment. Alston appropriately identified general comments as a ‘double-edged sword’ for States Parties who launch attacks criticising their legitimacy as it not only draws attention to their disagreement with the opinion and authority of the commenting

<sup>29</sup> See CERD Committee, *General Recommendation No. 26: Article 6 of the Convention*, UN Doc. A/55/18, annex V (2000), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7498&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7498&Lang=en) (last accessed 21 November 2014).

<sup>30</sup> See HRC, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6, 04 Nov.1994, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.6&Lang=en) (last accessed 21 November 2014).

<sup>31</sup> See CEDAW Committee, *General Recommendation No 4: Reservations*, UN Doc. HRI/GEN/1/Rev.9, vol. II (2008), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom4> (last accessed 18 November 2014).

<sup>32</sup> G. Ulfstein, ‘Law-making by Human Rights Treaty Bodies’ in R. Liivoja and J. Petman (eds), *International Law-Making: Essays in Honour of Jan Klabbers* (Routledge, 2014) 252.

<sup>33</sup> Keller and Grover (n14) 118.

committee, but also highlights the committee’s interpretation of the controversial right, thus establishing a benchmark for other States Parties.<sup>34</sup>

Much of the opinion surrounding general comments has turned on the drafting and the process by which the comment is adopted;<sup>35</sup> comments specifically derived from treaty documents have met far less criticism than those that are more creative with the execution of a treaty body’s remit. Examples of both can be found in the 2008 General Comment 33<sup>36</sup> of the HRC, which deals with States Parties’ obligations pursuant to the Optional Protocol<sup>37</sup> to the ICCPR (OP-ICCPR). The HRC notes that under Article 2 of the OP-ICCPR that a State Party is obliged to provide the author of a complaint with an effective remedy when an ICCPR violation is determined by the Committee. By grounding their statement in the treaty text, States Parties are reminded of the obligations to which they have agreed in becoming a party to the Covenant. Paragraph 19, by contrast, refers to the HRC’s rules of procedure as a basis for implementing interim measures where it is thought that irreparable harm is likely to occur before the Committee is able to develop its final views on the complaint. Though linked back to its purpose under the OP-ICCPR and obviously an important tool, using the rules of procedure as a basis for obliging a state to comply with a Committee decision is far weaker than using the actual obligation to which the state has subscribed.

### 3.4 Summary

A mounting hazard for states, which is equally a windfall for human rights protection, is that treaty body jurisprudence is often viewed as a form of developing law and is increasingly been cited by domestic courts and regional human rights organs, thus incorporating them into the corpus of case law and moving them to a less ‘soft’ form of law, particularly in common law jurisdictions. This use of treaty body jurisprudence may be more appropriately referred to as ‘liquid’ law in the domestic context as it aids in filling the gaps in rights assessment. In

<sup>34</sup> Alston (n14) 763, and 874 of reprinted version.

<sup>35</sup> Keller and Grover (n14) 119.

<sup>36</sup> HRC, *General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc. CCPR/C/GC/33 (2008), [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_33\\_4746\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_33_4746_E.pdf) (last accessed 20 November 2014).

<sup>37</sup> HRC General Comment 34 notes at paragraph 3: ‘The preamble to the Optional Protocol states that its purpose is “further to achieve the purposes” of the Covenant by enabling the Human Rights Committee, established in part IV of the Covenant, “to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.” The Optional Protocol sets out a procedure, and imposes obligations on States parties to the Optional Protocol arising out of that procedure, in addition to their obligations under the Covenant.’

these situations, the legal opinion of a treaty body can be both validated by the court and lend legitimacy to existing and future treaty body opinions. It is to this phenomenon that this paper will now turn.

## **4. General Comments in Domestic Courts**

There is indeed a strong argument to rely heavily on the opinions of the treaty bodies as interpretive tools in light of the special nature of both the treaty bodies and the nature of the rights their constitutive treaties are designed to protect. It must be acknowledged, however, that as far as the codified rules of treaty interpretation are concerned there is no mention of the treaty-specific monitoring mechanisms within the 1969 Vienna Convention on the Law of Treaties. Treaty bodies had not begun to operate at the time the Vienna Convention was adopted thus it would have had no cause to address such mechanisms.<sup>38</sup> This underscores the point that international law and human rights law, particularly, are dynamic and evolving and thus updates must be considered in order to maintain a coherent system.

The following sections examine the increasing recognition of general comments by a selection of domestic courts. One caveat must be set forth from the outset and that is that this is an extremely preliminary overview of the case law derived from three distinct jurisdictions and is by no means comparative between them, nor exhaustive in any way. Particularly the following gives a perfunctory overview of general comments as introduced into the UK, South African and European courts.

### **4.1 United Kingdom**

The UK is party to CERD,<sup>39</sup> ICESCR,<sup>40</sup> ICCPR,<sup>41</sup> CEDAW,<sup>42</sup> CAT,<sup>43</sup> the CRC<sup>44</sup> and the CRPD,<sup>45</sup> thus opinions stemming from the associated treaty bodies should be acknowledged

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<sup>38</sup> Though the treaty bodies were functioning prior to the entry into force of the Vienna Convention in 1980. In its Guide to Practice on Reservations to Treaties the International Law Commission specifically recognises the role of treaty bodies in monitoring and determining issues related to human rights treaty interpretation, see Report of the International Law Commission on its 63<sup>rd</sup> session, Guide to Practice on Reservations with commentary, UN Doc. A/66/10/Add.1 (2011), 3.2 and 3.2.1. For an examination of this competence, see K.L. McCall-Smith, 'Reservations and the Determinative Function of the Human Rights Treaty Bodies' (2011) 54 *German Yearbook of International Law* 521-564.

<sup>39</sup> The UK signed on 11 Oct. 1966 and ratified on 7 Mar. 1969.

<sup>40</sup> The UK signed on 16 Sept. 1968 and ratified on 20 May 1976.

<sup>41</sup> The UK signed on 16 Sept. 1968 and ratified on 20 May 1976.

<sup>42</sup> The UK signed on 22 Jul. 1981 and ratified on 7 Apr. 1986.

<sup>43</sup> The UK signed on 15 Mar. 1985 and ratified on 8 Dec. 1988.

and observed ‘in good faith’ in accordance with the Vienna Convention on the Law of Treaties. The trend of referencing treaty body documentation in the UK began shortly after the adoption of the Human Rights Act<sup>46</sup> in 1998, yet it has taken some time for the products of the treaty bodies to evolve into and become accepted as more mainstream interpretive tools in the UK domestic legal system. Since the inception of the UK Supreme Court, intermittent reference to the treaty bodies has increased and this has trickled down to lower courts in their effort to maintain coherence with the rulings of the highest court.

Assessment of human rights and the expansion of rights are very much shaped by Article 2 of the Human Rights Act 1998 in the UK, which provides:

2 Interpretation of Convention rights.

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

Thus, whilst it specifically outlines that UK courts must take into account the jurisprudence of the European Court of Human Rights and opinions of other European Convention on Human Rights organs, there is no direct reference to jurisprudence emanating from the UN treaty bodies. However, this omission has not prevented British courts from utilising treaty body jurisprudence in the course of interpreting human rights issues that come before them.

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<sup>44</sup> The UK signed on 19 Apr. 1990 and ratified on 16 Dec. 1991.

<sup>45</sup> The UK signed on 26 Feb. 2009 and ratified on 7 Aug. 2009.

<sup>46</sup> Great Britain. *Human Rights Act 1998: Elizabeth II. Chapter 42*. (1998). London: The Stationery Office, ‘An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.’

In the early months of 2014, the UK Supreme Court reflected on general comments in a handful of cases. For example, *Kennedy v the Charity Commission*<sup>47</sup> recounted the evolution of the freedom of expression under Article 10 of the ECHR and how it has been expanded to include access to information in order to facilitate expression, particularly in the context of a public watch-dog.<sup>48</sup> The Court noted that the European Court of Human Rights relied on General Comment No. 34 in which the Human Rights Committee<sup>49</sup> (HRC) underscored that ‘the right of access to information includes a right whereby the media has access to information on public affairs.’<sup>50</sup> Thus the Supreme Court ‘confidently conclude[d] that a right to require an unwilling public authority to disclose information can arise under article 10’<sup>51</sup> because the right of access goes hand in hand with freedom of expression, as outlined in the HRC’s interpretation of Article 19 of the ICCPR. This does not mean that limitations cannot be put in place through legislation, such as those limitations established by the Freedom of Information Act, however it demonstrates that in the UK the domestic evaluation of the freedom of expression tracks the interpretation provided by the HRC in its general comment and therefore strengthens and refines the shared universal dimensions of the right.

Examination of free movement has been a recurrent theme on which UK courts have looked to the treaty bodies for guidance. The HRC’s General Comment No. 27 on Freedom of Movement was invoked by an administrative judge in the 2010 *Agyeman* case.<sup>52</sup> The judge pointed out that despite the fact that the ICCPR was not incorporated into domestic law, the freedom of movement outlined in Article 12 and expounded upon by the HRC in paragraphs 19 and 21 of the general comment, were rights flowing to British subjects by virtue of their citizenship.<sup>53</sup> Specifically, the focus was on the deprivation of the right of a person to enter his own country. The dicta of the case recognised that this right was set forth in domestic, European and international law, though it was not an unfettered right. As outlined in the comment, the interference with an individual’s right to return to his country of

<sup>47</sup> *Kennedy v the Charity Commission* [2014] 2UKSC 20, [2014] WLR 808.

<sup>48</sup> *Ibid.*, para. 186.

<sup>49</sup> The Human Rights Committee is the monitoring mechanism attached to the ICCPR.

<sup>50</sup> HRC, *General Comment 34 – Article 19: Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34 (2011), para. 18,

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en) (last accessed 19 November 2014).

<sup>51</sup> *Kennedy* *supra* note 48, para. 190.

<sup>52</sup> *Derrick Agyeman v. Secretary of State for Foreign and Commonwealth Affairs, Secretary of State for the Home Department*, CO/8185/2006, [2010] EWHC 2180 (Admin) (11 Aug. 2010), para. 13.

<sup>53</sup> *Ibid.*, paras 12-13.

residence may only be interfered with to the extent that is ‘reasonable in particular circumstances’.<sup>54</sup> In this case, the Court determined that the claimant in the case had to accept that the difficulties with which he dealt in relation to obtaining a new British passport as a British citizen were justified in light of the security concerns of the age in which we live. Thus the general comment was once again used to refine the outer limits of the right of free movement by highlighting the restrictions that might legitimately be employed by the state.

Immigration and asylum actions are possibly the most frequent cases to invoke the opinions of the treaty bodies in the UK, but this is largely due to the frequency of such cases both at the administrative and higher court levels. In 2012 the UK Supreme Court examined *RT & KM (among others) v Secretary of State*<sup>55</sup>, a series of cases revolving around asylum seeking refugees from Zimbabwe who not only claimed not to support the current Zimbabwean regime, but simply had no political views whatsoever. However, they argued that if returned to Zimbabwe, it would be necessary for them to lie and profess support for the regime in order to avoid persecution in light of the Zimbabwean authority’s view that ‘you are either with us or against us.’<sup>56</sup> The Court underscored that there was ‘no support in any of the human rights jurisprudence for a distinction between the conscientious non-believer and the indifferent non-believer’<sup>57</sup>, thus the claimants should not be denied asylum simply because they had no political views nor should the alternative to asylum be that they could live a lie in their home state simply to avoid persecution. In considering the exercise of the right to freedoms of thought, conscience and religion, as well as the freedom of expression, the Court tracked the HRC’s approach to these rights.<sup>58</sup>

The United Nations Human Rights Committee has commented on these rights. In its General Comment No 22 on article 18 (30 July 1993), it said that the right to freedom of thought, conscience and religion in article 18.1 is “far reaching and profound” (para 1); the terms “belief” and “religion” are to be “broadly construed” (para 2); and article 18 protects “theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief” (para 2). In its General Comment No 34 on article 19 (12 September 2011), it said that freedom of opinion and freedom of expression are

<sup>54</sup> HRC, *General Comment 27: Freedom of Movement*, UN Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 21, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en) (last accessed 18 November 2014).

<sup>55</sup> *RT & KM (among others) v Secretary of State* [2012] UKSC 38, [2012] 4 All ER 843.

<sup>56</sup> *Ibid.*, para. 44.

<sup>57</sup> *Ibid.*, para. 45, relying on *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596.

<sup>58</sup> *Ibid.*, para. 33.

“indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society” (para 2). All forms of opinion are protected (para 9). At para 10, it said: “Any form of effort to coerce the holding or not holding of any opinion is prohibited. Freedom to express one’s opinion necessarily includes freedom not to express one’s opinion.

It is clear that the Court worked to maintain a consistent interpretation of the rights involved by paying great deference to the rights as outlined in the HRC’s comments. By utilising the HRC interpretation of the right to freedom of thought, conscious and religion the Court aids in building a broad consensus on the expansive nature of the right.

Continuing a long line of asylum and immigration cases specifically involving children, in early March of 2011 a Civil Court of Appeal judge found that five paragraphs of the CRC Committee’s General Comment No. 6 on Treatment of Unaccompanied and Separated Children Outside their Country of Origin<sup>59</sup> were particularly relevant in *DS (Afghanistan)*.<sup>60</sup> The specificity with which the judge referred to the general comment left no room for questioning the importance of the comment as a tool for interpreting the validity of government actions. The previous month, the Supreme Court had noted in *ZH (Tanzania)* that the most relevant legislation to the question of the effects of deportation on a child was Article 3(1) of the CRC which establishes the ‘best interests of the child’ as the primary consideration for all actions involving children.<sup>61</sup> Though a different child-related immigration/asylum issue was asked than in *DS (Afghanistan)*, both courts relied on the best of interests of the child derived directly from the CRC and elaborated upon by the CRC Committee’s general comments.<sup>62</sup> Notably, the *ZH (Tanzania)* opinion also cited the CRC Committee’s General Comment No. 6 and articulated that:<sup>63</sup>

Exceptionally, a return to the home country may be arranged, after careful balancing of the child's best interests and other considerations, if the latter are rights-based and

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<sup>59</sup> CRC Committee, *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, UN Doc. CRC/GC/2005/6 (2005), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2005%2f6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2005%2f6&Lang=en) (last accessed 19 November 2014).

<sup>60</sup> *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305, para. 65.

<sup>61</sup> *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSCA, para. 23.

<sup>62</sup> *DS (Afghanistan)* (n60) para. 22; *ZH (Tanzania) (FC)* (n61) para. 23.

<sup>63</sup> *ZH (Tanzania) (FC)* (n61) para. 27.

override best interests of the child. Such may be the case in situations in which the child constitutes a serious risk to the security of the State or to the society. Non-rights based arguments such as those relating to general migration control, cannot override best interests considerations.

With the Supreme Court recognising the CRC Committee’s opinion, it is no wonder that a great ripple effect was created by the decision. Following on from *ZH (Tanzania)*, the *Mansoor* case, in a very similar fact pattern and relying heavily on that case, repeated the acceptance of CRC General Comment No. 6.<sup>64</sup> The *Mansoor* decision noted that the UK Supreme Court has adopted ‘the approach recommended by international bodies, including the general comments of the rights of the child and the UNHCR guidelines, to the extent that a rights-based approach must be brought into being in order to justify accumulation of factors which could be said to outweigh the best interests of the child as a primary consideration in these cases.’<sup>65</sup>

Thus, the progeny of *ZH (Tanzania)* continues to reinforce the strength of treaty body general comments as an integral consideration for interpreting UK law, whether as some form of evolving law or as an interpretive tool.

The use of general comments by the UK judiciary presented here demonstrates that these treaty body products aid in developing a more complete picture of international human rights obligations. It is not that British courts always utilise the chisel approach surveyed here. However, the selection of cases above highlights the potential for a common interpretation of international human rights driven by treaty body general comments.

## 4.2 South Africa

In 1995, a South African court opined in the *Makwanyane* case that both non-binding, as well as binding, international law ‘may be used as tools of interpretation’<sup>66</sup> in keeping with Section 39 of the state’s (now former) Constitution—which is reflected in the current

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<sup>64</sup> *The Queen on the application of Mansoor v Secretary of State for the Home Department* [2011] EWHC 832 (Admin), para. 27, citing UN CRC, General Comment No 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, UN Doc. CRC/GC/2005/6 (2005), para. 86,

<sup>65</sup> *Ibid.*, para. 32.

<sup>66</sup> *S v. Makwanyane and Another*, 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665), para. 35.



Constitution, also in Article 39.<sup>67</sup> The list of potential sources of international law provided in the 1995 decision included instruments produced by the HRC,<sup>68</sup> despite the fact that the state had not yet ratified the ICCPR. At present, South Africa is party to CERD,<sup>69</sup> ICCPR,<sup>70</sup> CEDAW,<sup>71</sup> CAT,<sup>72</sup> CRC,<sup>73</sup> CRPD<sup>74</sup> and it has signed the ICESCR<sup>75</sup>. Since the passage of the 1996 South African Constitution<sup>76</sup> the Constitutional Court has been particularly willing to utilise general comments in an effort to interpret rights stemming from the Constitution's Bill of Rights (Articles 7-39). Interestingly, the South African courts tend to invoke general comments of the Committee on Economic, Social and Cultural Rights (ESCR Committee) most often, even though, as of November 2014, it has not ratified the ICESCR.

In 2000, the Constitutional Court employed relevant international law, including a general comment issued by the ESCR Committee, as a tool of interpretation when considering the socio-economic right of access to housing in *South Africa v. Grootboom*.<sup>77</sup> The Court incorporated paragraph 10 of General Comment No. 3 on The Nature of States Parties' Obligations into the opinion verbatim to establish that the 'minimum core obligation' is necessary to determine whether a state was in violation of its obligations under the ICESCR, as outlined by the ESCR Committee. The minimum core obligation was eventually determined to be outwith the scope of the case,<sup>78</sup> however, the dicta proved useful in subsequent examinations of alleged violations of economic and social rights. Many human rights observers took issue with the Court for its failure to employ a 'minimum essential level' of an economic, social and cultural right,<sup>79</sup> as outlined by the ESCR Committee in

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<sup>67</sup> Article 39, para. 1, of the current Constitution of the Republic of South Africa reads as follows: 'When interpreting the Bill of Rights, a court, tribunal or forum—;(b) must consider international law; and (c) may consider foreign law.'

<sup>68</sup> *Ibid.*, para. 35.

<sup>69</sup> South Africa signed on 3 Oct. 1994 and ratified on 10 Dec. 1998.

<sup>70</sup> South Africa signed on 3 Oct. 1994 and ratified on 10 Dec. 1998.

<sup>71</sup> South Africa signed on 29 Jan. 1993 and ratified on 15 Dec. 1995.

<sup>72</sup> South Africa signed on 29 Jan. 1993 and ratified on 10 Dec. 1998.

<sup>73</sup> South Africa signed on 29 Jan. 1993 and ratified on 16 Jun. 1995.

<sup>74</sup> South Africa signed on 30 Mar. 2007 and ratified on 30 Nov. 2007.

<sup>75</sup> South Africa signed on 3 Oct. 1994.

<sup>76</sup> Adopted on 18 Dec. 1996 and became effective on 4 Feb. 1997.

<sup>77</sup> *South Africa v. Grootboom*, 2001 (1) SA 46 (CC) (4 Oct. 2000).

<sup>78</sup> 'There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a Court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core content of a right.' *Ibid.*, 66.

<sup>79</sup> For example, D. Davis, 'Socio-economic rights in South Africa: The record of the Constitutional Court after Ten Years' (2004) 5 *ESR Review* 3-7; Institute for Democracy in Africa (IDASA), 'The Women's Budget',

General Comment No. 3.<sup>80</sup> Effectively the opinion severed an essential component of the realisation of economic and social rights identified by the ESCR Committee, thereby inhibiting the development of a universal interpretation of the right to adequate housing.<sup>81</sup> The Court opted for a test of reasonable legislative (and other) measures within its available resources to progressively realise the right to housing. Whilst in many ways *Grootboom* was a major victory in the fight to have economic, social and cultural rights recognized and substantiated in a court of law, it is a sad note that eight years after Irene Grootboom's 'victory', she died in a shack in Cape Town without any indicia of her right to housing having been fulfilled. Without employing the 'minimum essential level' outlined by the ESCR Committee, the realisation of the right was not achieved.

The ESCR Committee has issued two general comments on the right to adequate housing and both have been employed by the Constitutional Court in subsequent efforts to flesh out the duties imposed on the state by Article 26 of its Constitution, particularly in relation to displaced individuals. Article 26(1) provides that '[e]veryone has the right to have access to adequate housing.' The South African Constitutional right to 'access' adequate housing is somewhat different than the right as introduced by ICESCR Article 11(1). General Comment No. 7, The Right to Adequate Housing,<sup>82</sup> was utilised by the Constitutional Court in the 2009 *Joe Slovo Community*<sup>83</sup> forced evictions case. It drew upon the treaty body's interpretation of appropriate measures to establish the obligation of the state to provide housing for those persons subject to a legitimate forced eviction.<sup>84</sup>

[E]victions should not result in people being rendered homeless. And where the people affected by the eviction are unable to provide for themselves, the [government] must take all appropriate measures, to the maximum of its available resources, to

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Budget Brief No. 111, (October 2002), [http://oppenheimer.mcgill.ca/IMG/pdf/10-09\\_Fondements\\_Pleniere\\_Grootboom.pdf](http://oppenheimer.mcgill.ca/IMG/pdf/10-09_Fondements_Pleniere_Grootboom.pdf) (last accessed 13 November 2014).

<sup>80</sup> ESCR Committee, *General Comment No. 3: The nature of States parties' obligations*, U.N. Doc. E/1991/23, annex III at 86 (1991) para. 10.  
[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TiBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TiBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11) (accessed 13 Nov. 2014).

<sup>81</sup> It must be acknowledged, also, that the South African right is phrased 'right to *have access* to adequate housing' (emphasis added) whilst the international obligation is the 'right to adequate housing' which some argue are two different concepts.

<sup>82</sup> ESCR Committee, *General Comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions*, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), paras 7, 16,  
[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f6430&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f6430&Lang=en) (last accessed 20 November 2014).

<sup>83</sup> *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others* (CCT 22/08) (2009).

<sup>84</sup> *Ibid.*, para. 32.

ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

Comment No. 7 was also used to define the duty of the government, including procedural protections, when relocating people under South Africa's PIE<sup>85</sup> policy.<sup>86</sup> Previously, in *Mpange v. Sithole*,<sup>87</sup> the Court had relied upon the ESCR Committee's 1991 General Comment No. 4 on the Right to Adequate Housing<sup>88</sup> to examine the duties imposed on the state by Article 26 of its Constitution with respect to the right to adequate housing.<sup>89</sup> In particular, the *Mpange* Court noted the interrelatedness of adequate housing and other fundamental rights, such as human dignity, as outlined by the ICESCR Committee.<sup>90</sup> Underscoring the relationship to human dignity is particularly important in light of the Constitutional Court's recognition of human dignity as the 'central value of the objective normative value system establish by the Constitution.'<sup>91</sup> It also emphasized the ESCR Committee's stress on the need for effective domestic legal remedies in order to comply with ICESCR obligations.<sup>92</sup> These references to general comments are a step forward, although the South Africa experience highlights that domestic use of these soft law instruments does not always equate to the successful implementation of a universal minimum standard of human rights.

More recently, in April 2011, the Constitutional Court used HRC General Comment No. 3<sup>93</sup> and ESCR Committee General Comment No. 13<sup>94</sup> to frame the importance of and basic right to education and to interpret a private party's obligation to not infringe the right of

<sup>85</sup> Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE), Act 19 of 1998.

<sup>86</sup> *Residents of Joe Slovo Community, Western Cape v supra* note 84, paras 36-37.

<sup>87</sup> *Mpange and Others v. Sithole* (07/1063) [2007] ZAGPHC 201 (22 Jun. 2007).

<sup>88</sup> ESCR Committee, *General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)*, UN Doc. E/1992/23 (1991), para. 8, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4759&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4759&Lang=en) (last accessed 17 November 2014).

<sup>89</sup> *Mpange* (n87) para. 51.

<sup>90</sup> *Ibid.*, para. 51.

<sup>91</sup> *Ibid.*, para. 53. On this point see A. Chaskalson, 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *South African Journal of Human Rights* 193-206.

<sup>92</sup> *Mpange* (n87) para. 52.

<sup>93</sup> HRC, General Comment No. 3, *Article 2 Implementation at the National Level*, Doc HRI/GEN/1/Rev.1 at 4 (1994), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f632&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f632&Lang=en) (last accessed 15 November 2014).

<sup>94</sup> ESCR Committee, General Comment No. 13, *The Right to Education*, UN Doc. E/C.12/1999/10 (1999).

education under the Bill of Rights. In *Juma Musjid Primary School*<sup>95</sup> the Court established that the Member of the Executive Council for Education for KwaZulu-Natal, a representative of the government, failed to comply with the positive obligation to ‘respect, protect, promote and fulfil’<sup>96</sup> the right to a basic education despite its recognised status as an empowerment right and ‘the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.’<sup>97</sup> In this instance, the use of the treaty bodies’ interpretations helped consolidate the international minimum standards required to fulfil the right to education.

It is not only the South African Constitutional Court that has relied upon general comments in pursuit of abiding by Article 39 of the state’s Constitution. In 2008, the High Court of South Africa relied upon ESCR Committee General Comment No. 15 on The Right to Water<sup>98</sup> - arts. 11 and 12 - to determine that ‘the State is obliged to provide free basic water to the poor’<sup>99</sup> despite there being no express right to water under international or South African law.<sup>100</sup> This case exemplified the Court’s readiness to recognise the interrelatedness and indivisibility of human rights and the fact that gaps related to the realisation of rights must often be filled using all available tools of interpretation.

The courts of South Africa have firmly established the outputs of the treaty bodies as indispensable sources of law. Though the use of general comments has not consistently represented a step forward in the universal standard of certain rights as addressed by the South African courts, progress can definitely be charted. As the courts tease out the true meaning of the protections provided in the South Africa Bill of Rights, the interpretive guidance provided by general comments, and other treaty body jurisprudence, will continue to be an unparalleled tool.

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<sup>95</sup> *Juma Musjid Primary School & Others v. Essay N.O. and Others* (CCT 29/10) [2011] ZACC 13 (11 April 2011).

<sup>96</sup> *Ibid.*, para. 45.

<sup>97</sup> *Ibid.*, para. 41, quoting the ESCR Committee, General Comment No. 13, UN Doc. HRI/GEN/1/Rev.9 (Vol. I).

<sup>98</sup> UN Doc. HRI/GEN/1/Rev.9 (Vol. I).

<sup>99</sup> *S v Mazibuko* (A1246/2006) [2008] ZAGPHC 106 (18 April 2008), paras. 36-37, see specifically para. 40.

<sup>100</sup> *Ibid.*, para. 45. The right to water, as indicated in General Comment No. 15, is derived from Article 11 of the ICESCR, which enunciates a non-exhaustive list of rights that must be insured in order to uphold the right to an adequate standard of living. See ESCR Committee, General Comment No. 15: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. HRI/GEN/1/Rev.9 (Vol. I), paras 2-6, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en) (last accessed 20 November 2014).

### 4.3 Europe as a supranational jurisdiction

European courts, including the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) were the quickest to consider treaty body jurisprudence as supporting sources in the course of evaluating complaints involving human rights issues. This swift uptake can be attributed to the prominence of the European Convention on Human Rights<sup>101</sup> (ECHR), which has guided European courts since 1950. Both the Council of Europe system and the European Union maintain human rights as a primary policy objective. Therefore it is unsurprising that these systems, supporting the development of universal human rights standards, have often utilised the soft law promulgated by the treaty bodies in their efforts to normalise the interpretation of rights.

In the 2010 *Bressol* case,<sup>102</sup> the CJEU enunciated its understanding that all Member States of the EU<sup>103</sup> were bound to both the ICCPR and the ICESCR.<sup>104</sup>

The Court has held that the International Covenant on Civil and Political Rights (ICCPR) is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law. It seems to me that the same should hold good for the ICESCR which, like the ICCPR, binds each individual Member State.

The case concerned the constitutionality of a decree regulating the number of students in certain programmes of higher education for the first two years.<sup>105</sup> The referring Belgian court essentially asked the CJEU to make a determination as to whether EU legislation precluded the type of decree and to explain the nature of Member States' rights under ICESCR Article 13(2)(c). The Court confirmed as relevant legislation articles of the ICESCR (Articles 2(2) and 13(2)(c)) dealing with the right to education without any form of discrimination and relied upon General Comment No. 13<sup>106</sup> to articulate that the prohibition against discrimination was 'subject to neither progressive realisation nor the availability of

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<sup>101</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). 4 Nov. 1950, ETS No. 005, 213 UNTS 221, as amended by Protocol Nos. 11 (ETS No. 155) and 14 (CETS No. 194), entry into force 1 Jun. 2010.

<sup>102</sup> *Bressol and Others v. Gouvernement de la Commuauté Française(of Belgium)*, (Case C-73/08) [2010] 3.C.M.L.R. 20 (ECJ-GC), 13 Apr. 2010.

<sup>103</sup> All EU Member States are individual parties to both Covenants.

<sup>104</sup> *Bressol* (n102) para. AG136, footnotes omitted.

<sup>105</sup> *Ibid.*, para. 2.

<sup>106</sup> ESCR Committee, General Comment No 13 (n94).

resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.<sup>107</sup> Though the CJEU has far less call to refer to the treaty bodies, the above quoted passage leaves no room for questioning whether these treaties must be acknowledged by the EU Member States, which in turn, could bring general comments into use as a regular interpretive tool.

As the primary court of review human rights violations, the ECtHR has had many occasions to refer to the opinion of various treaty bodies. The cases discussed here represent a sampling of those where a general comment was invoked as an interpretive tool. In 2014, the ECtHR applied HRC General Comment No. 20, in concert with other international law, in *Marguš v Croatia*<sup>108</sup> to assess the issue of the right not to be tried for the same charges and the right to a fair trial in light of an amnesty granted to the claimant. Following General Comment No. 20, the ECtHR recognised that, though some States have granted amnesties for acts of torture, such amnesties violate the duty of states under the ICCPR to investigate and prevent acts prohibited by ICCPR Article 7. Thus in this instance, the ECtHR utilised the general comment to reinforce the need to limit the use of amnesties in order to ensure justice for the victims of torture or other prohibited treatment. *Marguš* represents one of a growing line of cases focused on refining the prohibition against torture and the multifarious ways in which the breach of the right might be manifested.

The legal qualification of threats as torture was examined by the ECtHR in 2010. As part of its evaluation, the Court referenced a 2001 report by the UN Special Rapporteur for the Commission on Human Rights where he reminded governments the prohibition of torture related also to acts that cause mental suffering, including intimidation and threats as pointed out in the HRC General Comment No. 20. It also referenced HRC General Comment No. 7 (which was replaced by No. 20) to confirm the principle of the importance of effective protection and remedy for victims of torture or ill-treatment, including the inadmissibility of statements or confessions obtained by torture or other prohibited treatment. The impact of General Comment Nos. 7 and 20 continue to resonate in cases throughout both the Council of Europe and European Union systems.

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<sup>107</sup> *Bressol* (n103) para. 138. The court ultimately concluded that the ICESCR articles would only be applicable, however, if the decree at issue was ruled compatible with the TFEU. See Order, para. 2.

<sup>108</sup> *Marguš v Croatia*, ECtHR (GC) [2014] ECHR 523.

In *Baka v. Hungary*,<sup>109</sup> the ECtHR sat in a unique position as it heard an application by one of its former members relating to the independence of the judiciary. The Court relied heavily on HRC General Comment No. 32 on the Right to equality before courts and tribunals and to a fair trial to outline the international guidance on what ICCPR Article 14 required in the context of independence of the judiciary and protecting judges from political influence.<sup>110</sup> The ECtHR ultimately found that Baka's ECHR Article 10 rights had been violated and in doing so confirmed an international standard for the independence of the judiciary.

The *Hirst*<sup>111</sup> judgment in 2005 referred to HRC General Comment No. 25(57)<sup>112</sup> which detailed the requirement that states provide detailed information on any legislation that was the basis of suspending the right to vote.<sup>113</sup> The case involved prisoner voting rights in the UK and the Court ultimately held that the UK was in violation of ECHR Protocol No. 1, Article 3 due to the broad blanket ban depriving prisoners of the right to vote. In another 2005 case, *Öcalan v. Turkey*, the ECtHR recognised the findings of the HRC in *Reid v. Jamaica*, which were based on its General Comment No. 6: Article 6 (Right to Life)<sup>114</sup>, as 'international developments concerning the death penalty.'<sup>115</sup> Thus the Court noted the changing views of the international community at large as set forth by the HRC general comment.

A distinguishing feature of the ECtHR is its ability to stay on top of the large amount of information coming out of the treaty bodies and to employ it without delay. One reason for this may be the number of judges that sit on the ECtHR that formerly served as members of a treaty body.<sup>116</sup> It could also be the increasing cross-fertilisation of information across international human rights mechanisms. Whatever the reason, the ECtHR has demonstrated a

<sup>109</sup> *Baka v. Hungary* (Chamber) [2014] ECHR 528.

<sup>110</sup> HRC, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32 (2007), paras 19-21, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en) (last accessed 20 November 2014).

<sup>111</sup> *Hirst v. United Kingdom*, ECtHR (GC), No. 74025/01, judgment 6 Oct. 2005, para. 27.

<sup>112</sup> *Participation in Public Affairs and the Right to Vote*, UN Doc. CCPR/C/21/Rev.1/Add.7

<sup>113</sup> *Hirst* (n111) para. 27.

<sup>114</sup> HRC, *General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11) (last accessed 19 November 2014).

<sup>115</sup> *Öcalan v. Turkey*, ECtHR (GC), No. 46221/99, judgment 12 May 2005, para. 60.

<sup>116</sup> Judge Boštjan Zupančič was a member of the CAT Committee (1995-98); Judge Linos-Alexandre Sicilianos was a member of the CERD Committee (2002-09); Judge Helen Keller was a member of the HRC (2008-11); Judge Iulia Antoanella Motoc was a member of the HRC (2006-13).

deft capacity to engage the jurisprudence of the treaty bodies in its navigation of international human rights standards.

The 2007 General Comment No. 10 of the CRC Committee and the 2008 General Comment No. 2 of the CAT Committee were used by the Court in the November 2008 *Salduz v. Turkey*<sup>117</sup> judgment to elaborate on the relevant law concerning legal assistance to minors in police custody. It expressly incorporated two paragraphs of the CRC Committee comment<sup>118</sup> and one from the CAT comment<sup>119</sup> to interpret the extent of Turkey's obligation to provide assistance, legal or otherwise, in cases involving juveniles and the general right of access to a lawyer while in police custody. Regarding general comments as interpretive tools, *Salduz* is particularly interesting in that it used two comments that were issued after the commencement of the case which highlights the evolving nature of the tools that are essential to rights protection.

The use of general comments quite often reflects the interrelatedness and indivisibility of human rights as recognised in a broad range of treaties. HRC General Comment No. 29: States of Emergency (Article 4)<sup>120</sup> was used in 2009 to assist in determining the legal standard as to when a legitimate derogation to the ECHR could be claimed. The applicants in the case alleged unlawful detention, which was countered by the UK with an argument that it was derogating (as outlined in the Anti-terrorism, Crime and Security Act 2001) from certain ECHR obligations. Primary questions in the cases leading to the ECtHR hearing were the actual existence of a valid 'public emergency' and the duration of the derogation to Article 5 of the ECHR. As noted in the Comment No. 29, '[m]easures derogating from the provisions of the Covenant must be of an exceptional and temporary nature.'<sup>121</sup> The Court ultimately held that despite there being a public emergency worthy of derogation and that the derogation was not of an unreasonable duration in keeping with accepted law, including General

<sup>117</sup> (ECtHR) App. 36391/02, 27 Nov. 2008.

<sup>118</sup> CRC Committee, *General Comment No. 10: Children's rights in juvenile justice*, UN Doc. CRC/C/GC/10 (2007), paras 49, 52, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f10&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f10&Lang=en) (last accessed 19 November 2014).

<sup>119</sup> CAT Committee, *General Comment No. 2 : Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2 (2008), para.13, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en) (last accessed 20 November 2014).

<sup>120</sup> HRC, *General Comment No 29: State of Emergency (article 4)*, UN CCPR/C/21/Rev.1/Add.11 (2001), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.11&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.11&Lang=en) (last accessed 19 November 2014).

<sup>121</sup> *Case of A and Others v. United Kingdom*, App. 3455/05, 19 Feb. 2009, citing HRC General Comment 29, para. 2.



Comment No. 29, the ‘derogation measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals.’<sup>122</sup> Thus, mixing and matching the various international obligations and standards was necessary to get to the heart of the breach of the obligation.

The approach of the ECtHR in referencing a wide range of treaty body jurisprudence, as demonstrated in *Neulinger*, reinforces the common mantra that a human rights convention ‘cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law.’<sup>123</sup> The *Neulinger* decision relied upon HRC General Comments Nos. 17 and 19, among several other international documents to tease out the meaning of the ‘best interests of the child’<sup>124</sup> and the decision has resonated across many European states. The position of the ECtHR, as well as other supranational human rights courts, is unique in the potential for its decisions, and the reasoning articulated therein, to influence the states within its regulatory system. Giving pride of place to treaty body instruments as means of determining human rights standards at the European level strengthens the ‘soft’ nature of this jurisprudence and underscores its value as an interpretive tool.

## 5. Conclusion

It is clear that the general comments of the human rights treaty bodies are being referenced in judicial opinions at the domestic and supranational level. Whether introduced by zealous human rights defenders, NGO amicus briefs or the judges themselves, it cannot be denied that the interpretations of human rights conventions by the treaty bodies are gaining traction in domestic courts. What is less clear is the legal value that attaches to the comments in light of this phenomenon. This is particularly true when the comments are employed to achieve different aims than originally intended by the treaty body or where a court opts not to adopt the approach taken by the treaty body issuing the comment.

In some instances the use of general comments is norm-filling and aids in refining the universal interpretation of human rights. In others, a court’s failure to follow the reasoning of the treaty body suggests that the right is subject to alternative or selective interpretations and may be shattered by the reluctance of domestic judiciaries to follow the international

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<sup>122</sup> *Ibid.*, para. 181,190.

<sup>123</sup> *Neulinger v Switzerland* (2010) 28 BHRC 706, para. 131.

<sup>124</sup> *Ibid.*, paras 49-56.

interpretation. In those instances where the highest courts in a jurisdiction have opted use general comments to construe a state's obligations, it can be certain that lower courts will follow suit. Does this indicate broadening of the available interpretive tools or should these examples be treated as mere throw-away observations? The evolution of the international human rights system has occurred in many ways that were not conceived at its inception in 1948. The impact of general comments must be included in this observation and only time will reveal the true interpretive power of this form of treaty body jurisprudence.